In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 277

HARRY G. SILVERSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, his son and his son-in-law are the managing partners in at least 9 real estate syndicates ranging in size from $225,000 to in excess of $1,000,000 (R. 39a). The Internal Revenue Service served summonses on petitioner requesting him to produce the books and records of these syndicates (R. 12a–13a, 35a). He complied as to two and claimed his Fifth Amendment privilege with respect to the records of the other seven (R. 36a–37a). In a case concluded in 1963 petitioner was required to produce the books of five of these syndicates which were cast in the form of limited partnerships. *United States* v. *Silverstein,* 210 F. Supp. 401 (S.D.N.Y.), affirmed, 314 F. 2d 789 (C.A. 2), certiorari denied, 374 U.S. 807. The instant

781-511—65

case involves the remaining two syndicates, which although cast in the form of general partnerships, have characteristics which (the lower courts found) make them as impersonal as the limited partnerships involved in the earlier case (R. 38a; Pet. 2a).

The two syndicates here in question, Motel City B and Motel City C, each have 20 partners; their capitalizations are in excess of $700,000 and $1,000,000, respectively (R. 39a). The petitioner, along with his son and son-in-law, manages the business of the syndicates; and the other 17 partners, who are denominated "non-managing partners," are passive investors (R. 39a, 45a). One of the non-managing partners testified (and it is stipulated that the others would have testified substantially the same) that the management of the business was solely in the hands of the petitioner and his two relatives, that the non-managing partners were merely investors, and that he did not know who the others were (R. 45a). The so-called managing partners had sole authority to admit new partners, apparently without consultation with the others (R. 40a–41a). The non-managing partners were free to (and at least one did) assign their rights to one or more outsiders without the consent of the other partners (R. 43a–44a). The non-managing partners had priority over the petitioner and his two relatives in the distribution of both income and assets, and at least some of the non-managing partners had indemnification agreements from the managing partners to protect them against partnership creditors (R. 43a).

On the basis of these facts the district court concluded that there were "no [significant] differences"

between the two syndicates here in question and the five real estate ventures involved in the earlier case (R. 38a). Both, he concluded, were impersonal associations of many people embodying "common or group interests," and not "the purely private or personal interests of * * * [their] constituents" (R. 48a). Therefore, he held that petitioner could not invoke his personal Fifth Amendment privilege with respect to the syndicates' books and records and ordered their production (R. 49a, 32a–34a). The court of appeals affirmed (Pet 1a–2a).

In *United States* v. *White*, 322 U.S. 694, this Court held that an officer of a labor union could not withhold production of union records on Fifth Amendment grounds because the privilege against self-incrimination applied only with respect to the production of an individual's personal and private records and not those of an organization embodying impersonal group interests. This Court stated (322 U.S. at 698–701):

> The constitutional privilege against self-incrimination is essentially a personal one * * *.
>
> * * * [T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. * * * [T]he official records and documents of [an] organization that are held by [an individual] in a representative rather than in a personal capacity cannot be the subject of the personal privilege * * *.
>
> * * * The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individ-

> ual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.
>
> * * * * *
>
> * * * The test * * * is whether one can fairly say under all the circumstances that a prticular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. * * *.

This test has been applied to require the officers of unincorporated associations to produce the organization's books and records in *McPhaul* v. *United States,* 364 U.S. 372, 380; *Rogers* v. *United States,* 340 U.S. 367, 371–372; *United States* v. *Fleischman,* 339 U.S. 349, 358. See also *United States* v. *Wernes,* 157 F. 2d 797, 800 (C.A. 7); *United States* v. *Onassis,* 133 F. Supp. 327, 333–335 (S.D.N.Y.); *United States* v. *Onassis,* 125 F. Supp. 190, 206–210 (D.C.D.C.).

As the Second Circuit stated in the earlier case against this petitioner, "The inquiry is * * * essentially a factual one into the nature of the particular entity." *United States* v. *Silverstein,* 314 F. 2d 789, 791, certiorari denied, 374 U.S. 807. In the instant case petitioner promoted the organization of a number of real estate syndicates, each engaging in large-scale economic activity for the benefit of all the participants and each with a large number of passive investors. Whether the passive investors might under some conceivable circumstances have been personally

liable for business debts despite the contractual arrangements designed to assure against this eventuality is certainly not controlling.[1] The lower courts correctly concluded from these facts that the instant syndicates had impersonal characteristics of their own and that their books reflected the activities of the group or association rather than petitioner's purely private or personal transactions.

No further review of this essentially factual determination is warranted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
MEYER ROTHWACKS,
BURTON BERKLEY,
Attorneys.

JULY 1965.

---

[1] We might also point out that, contrary to petitioner's contentions (Pet. 5, 8, 9). the personal relationship between participants and the personal right to choose one's co-participants were virtually nonexistent with respect to the two syndicates here in question.